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IN THE

Supreme Court of the United States

DAVID KING; DOUGLAS HURST;
BRENDA LEVY; AND ROSE LUCK,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, AS U.S. SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB LEW, AS U.S. SECRETARY OF THE TREASURY; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; AND JOHN KOSKINEN, AS COMMISSIONER OF INTERNAL REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATES OF OKLAHOMA, ALABAMA, GEORGIA, INDIANA, NEBRASKA, SOUTH CAROLINA, AND WEST VIRGINIA AND CONSUMERS' RESEARCH AS *AMICI CURIAE* SUPPORTING PETITIONERS

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Halbig v. Burwell, No. 14-5018, 2014 WL 3579745 (D.C. Cir. July 22, 2014).....4, 10, 14, 18

National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998)..... 10

Printz v. United States, 521 U.S. 898 (1997) 3

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Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029..... 1

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LEGISLATIVE MATERIALS

H. 7817, 2014 Gen. Assemb., Jan. Sess. (R.I. 2014), *available at* http://webserver.rilin.state.ri.us/BillText/BillText14/HouseText14/H7817.pdf 10

ADMINISTRATIVE MATERIALS

Congressional Budget Office:

Letter from Douglas W. Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf 13, 15

The Budget and Economic Outlook: 2014 to 2024 (Feb. 2014), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-Outlook2014_Feb.pdf 13, 15

Federal Reserve, *Summary of Commentary on Current Economic Conditions by Federal Reserve District* (Feb. 2013), *available at* http://www.federalreserve.gov/monetarypolicy/beigebook/files/Beigebook_20130306.pdf 12

News Release, Governor Dave Heineman, *Gov. Heineman on Federal Health Care Law: $646 Million State Exchange Too Costly* (Nov. 15, 2012), *available at* http://www.governor.nebraska.gov/news/2012/11/15_health_care.html 8

Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744 (Mar. 11, 2014) 17

U.S. Gov't Accountability Office, *Health Insurance: Seven States' Actions to Establish Exchanges under the Patient Protection and Affordable Care Act* (Apr. 2013), *available at* http://www.gao.gov/assets/660/654331.pdf 8

OTHER MATERIALS

Am. Compl. for Declaratory and Injunctive Relief, *Pruitt v. Sebelius, et al.*, Case No. CIV-11-030-RAW (E.D. Okla. filed Sept. 19, 2012) 2

Stephanie Armour, *Five States' Health-Care Exchanges See Costly Fixes*, Wall St. J. (June 3, 2014), *available at* http://online.wsj.com/articles/five-states-health-care-exchanges-see-costly-fixes-1401838017 ..... 9, 10

Linda J. Blumberg et al., Robert Wood Johnson Found. & Urban Inst.:

Halbig v Burwell: Potential Implications for ACA Coverage and Subsidies (July 2014), *available at* http://www.urban.org/publications/413183.html 7

Why Not Just Eliminate the Employer Mandate? (May 2014), *available at* http://www.urban.org/publications/413117.html 12

Connect for Health Colorado, *2015 Fiscal Year Budget and Health Insurer Assessment* (June 9, 2014), *available at* http://connectforhealthco.com/wp-content/uploads/2013/04/20140609-FY2015-Budget-Market-Assessment-Presentation.pdf 7-8

eHealth, *Health Insurance Price Index Report for Open Enrollment and Q1 2014* (May 2014), *available at* https://www.ehealthinsurance.com/affordable-care-act/wp-content/themes/ace/price-index/data/quarterly-index.pdf 15

Georgia Health Insurance Exchange Advisory Comm., *Report to the Governor* (Dec. 15, 2011) 9

Larry Levitt & Gary Claxton, Kaiser Family Found., *The Potential Side Effects of Halbig* (July 31, 2014), *available at* http://kff.org/health-reform/perspective/the-potential-side-effects-of-halbig/ 15

Mercer, *Health Care Reform After the Decision* (2012), *available at* http://www.ribgh.org/documents/resources/HCR_After_Decision_survey_report.pdf 13

MNsure, *Preliminary MNsure Budget for Calendar Year 15 – by Business Area* (Mar. 12, 2014), *available at* https://www.mnsure.org/images/Bd-2014-03-12-Prelim%202015%20Budget.pdf 8

News Release, Cover Oregon, *Oregon Moves Closer to Federal Website and Easier Enrollment* (July 1, 2014), *available at* https://www.coveroregon.com/discover/news/6 10

Rita E. Numerof, Galen Inst., *What's Wrong With Health Insurance Exchanges.* (May 2012), *available at* http://www.galen.org/assets/WhatsWrongWithExchanges.pdf 7

Pet. for Reh'g En Banc, *Halbig v. Burwell*, No. 14-5018 (D.C. Cir. filed Aug. 1, 2014) 11

PriceWaterhouseCoopers, *Health insurance premiums: comparing ACA exchange rates to the employer-based market* (2014), *available at* http://www.pwc.com/us/en/health-industries/health-research-institute/assets/pwc-hri-health-insurance-premium.pdf 13

INTEREST OF *AMICI CURIAE*[1]

Amici States Oklahoma, Alabama, Georgia, Indiana, Nebraska, South Carolina, and West Virginia have a profound interest in the prompt resolution of this case. Sections 1311 (codified at 42 U.S.C. § 18031) and 1321 (codified at 42 U.S.C. § 18041) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the "Act" or "ACA"), allow States to choose to establish an "American Health Benefit Exchange" (an "Exchange") to facilitate execution of the Act's key provisions. If a State elects not to establish an Exchange under section 1311, section 1321 authorizes the Secretary of Health and Human Services instead to establish an Exchange to operate in that State.

Important consequences flow from a State's decision whether to establish an Exchange. If a State elects to establish its own Exchange, the federal government will make "advance payments" of premium tax credits to insurance companies on behalf of some of the State's residents to subsidize health insurance enrollment through the State-created Exchange. Under the ACA's plain language, however, such tax

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date and that all parties have consented to the filing of this brief on behalf of Consumers' Research. Written consents of the parties to the filing of this brief have been filed with the Clerk.

subsidies are not available to individuals who live in States that have chosen not to establish an Exchange. Significantly, the federal government's payment of a subsidy – for even a single employee – triggers costly obligations for employers within that State (including the States themselves), placing such States at a competitive disadvantage in employment.

States have an overriding interest in ascertaining immediately and conclusively their rights and obligations under the ACA, so that they may make reasoned and informed healthcare policy choices that respect the needs and preferences of their employers and citizens. Decisions of *amici* States that were predicated on the implementation of the Act and its incentives as written have been unsettled by an interpretation of that law that cannot be squared with the plain text of the statute.[2]

Amicus Consumers' Research is an independent educational organization located in Washington, D.C., which has focused on consumer education and consumer welfare for more than 80 years. Consumers' Research opposes the IRS's broad use of regulatory authority to contradict its statutory mandate. Consumers' Research believes that market-distorting tax incentives will, to consumers' detriment, burden local employers and subsidize private insurers.

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[2] Oklahoma has brought litigation in the U.S. District Court for the Eastern District of Oklahoma, seeking a judgment invalidating the Internal Revenue Service ("IRS") regulations that are at issue in this case. *See* Am. Compl. for Declaratory and Injunctive Relief, *Pruitt v. Sebelius, et al.*, Case No. CIV-11-030-RAW (E.D. Okla. filed Sept. 19, 2012).

INTRODUCTION

Congress designed the ACA to grant States a central role in its implementation and administration. The Act provides that "[e]ach State shall establish an American Health Benefit Exchange for the State." ACA § 1311(b)(1), 42 U.S.C. § 18031(b)(1). In recognition of the core principle of federalism that the federal government cannot command States to act on its behalf, *see Printz v. United States*, 521 U.S. 898, 935 (1997), the Act acknowledges that a State may decline to establish an Exchange. It thus further provides that, if a State elects not to establish an Exchange, the Secretary of Health and Human Services "shall establish and operate such Exchange within the State." ACA § 1321(c), 42 U.S.C. § 18041(c). In light of the enormous burden associated with creating and operating a program of such complexity and the hardships establishing an Exchange would impose on employers, 34 States elected not to establish their own Exchanges, and two others failed to do so. *See* Pet. App. 44a-45a. The Department of Health and Human Services ("HHS") accordingly established federal Exchanges to operate in those States, consistent with its mandatory duty under the Act.

On July 22, 2014, two federal courts of appeals issued conflicting rulings regarding the lawfulness of an IRS regulation that purported to make available tax credits to individuals who purchase health insurance through a federally established Exchange. By its plain terms, the ACA provides tax credits only to persons who are covered by a health insurance plan purchased "through an Exchange established by the State under section 1311 of the [Act]." 26 U.S.C. § 36B(c)(2)(a)(1). The IRS, however, promulgated a

rule that extends those tax credits to those "enrolled in one or more qualified health plans through an Exchange," "regardless of whether the Exchange is established and operated by a State or by HHS." 26 C.F.R. § 1.36B-2(a)(1); 45 C.F.R. § 155.20. In *Halbig v. Burwell*, No. 14-5018, 2014 WL 3579745 (D.C. Cir. July 22, 2014), the D.C. Circuit held that the IRS regulation violates the plain text of the Act. In the decision below, issued hours after the decision in *Halbig*, the Fourth Circuit held that the statutory language is ambiguous, and then deferred to the IRS's regulation. Specifically, that court concluded, in disregard of the plain text of the statute, that it is ambiguous as to whether an Exchange established by the federal government is "an Exchange established by the State." Pet. App. 17a-18a.

The petition ably demonstrates the pressing need for this Court's immediate intervention to resolve the uncertainty and confusion those conflicting decisions create. *Amici* States write separately to emphasize the particular harms being suffered by States as a result of the current legal uncertainty.

REASONS FOR GRANTING THE PETITION

The petition presents an issue of surpassing importance to States' healthcare policy decisions. The conflicting decisions of the courts of appeals create untenable uncertainty for States, which face policy decisions regarding healthcare and insurance that have profound implications for their citizens, their employers, and their economies. Whether the ACA authorizes tax credits for individual health coverage purchased through federally established Exchanges is critical to those decisions. Consequently, States urgently need conclusive guidance on the availability of those tax credits so they may make reasoned policy decisions that protect the interests of their citizens and businesses.

Only this Court can provide the certainty that States need. The Court should therefore grant the petition for a writ of certiorari.

I. THE PETITION RAISES AN ISSUE OF SURPASSING IMPORTANCE AND EXCEPTIONAL URGENCY TO STATES' IMPLEMENTATION OF THE ACA

States face a momentous choice in implementing the ACA: whether to establish an Exchange pursuant to section 1311 of the Act. If a State declines to establish an Exchange, section 1321 of the Act requires the federal government instead to establish one to operate in the State. Important legal consequences flow from a State's decision.

The conflicting decisions of the courts of appeals create legal uncertainty that makes it impossible for States to make reasoned policy choices. *First*, States must decide whether to establish their own Exchanges (or reconsider their prior decisions whether to establish an Exchange) without knowing whether

tax credits are or are not available for individual health coverage purchased on federally established Exchanges. The conflicting decisions of the courts of appeals entail markedly different consequences of that choice, undermining States' ability to make that decision in the best interest of their citizens and businesses. *Second*, States must decide whether to establish their own Exchanges without knowing whether employers in States with federally established Exchanges will or will not be subject to the "assessable payments" that are triggered if an employee enrolls in coverage for which a tax credit is allowed. This question implicates States' policy responses both to the imposition of that burden on employers and to States' own roles as large employers potentially subject to this "employer mandate." *Third*, millions of citizens will not know with certainty whether they are or are not subject to the penalties associated with failing to obtain insurance coverage. These individuals will be forced to choose between purchasing insurance they may neither want nor need, risking incurring thousands of dollars of debt to the IRS by receiving unlawful tax credits, or forgoing insurance, risking penalties if the individual mandate is ultimately held to apply to them. This lack of certainty has significant consequences for States' economies.

1. As a result of the conflicting rulings, States do not know whether tax credits are or are not available through federally established Exchanges. The conflicting decisions of the courts of appeals result in wholly different incentives for States in this regard. Under the Fourth Circuit's decision, a State may elect not to undertake the significant effort and investment entailed in establishing its own Exchange

and choose instead to rely on a federally established Exchange.[3] If the Fourth Circuit's decision is upheld, citizens in States with federally established Exchanges will be eligible for tens of billions of dollars of tax credits to subsidize insurance premiums,[4] and employers will be subject to penalties that would not otherwise be imposed.[5] The D.C. Circuit's decision, by contrast, holds that tax credits are unavailable to citizens who purchase insurance through a federally established Exchange. The availability or unavailability of those tax credits is a critical factor to a State's decision whether to undertake the complicated and arduous process of establishing and operating an Exchange.[6]

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[3] Operating costs of federally established Exchanges are borne by the federal government. *See* 42 U.S.C. § 18041(c)(1).

[4] The Urban Institute estimates that the Fourth Circuit's decision would result in an additional $36.1 billion of subsidies in 2016. *See* Linda J. Blumberg et al., Robert Wood Johnson Found. & Urban Inst., *Halbig v Burwell: Potential Implications for ACA Coverage and Subsidies* 1 (July 2014), *available at* http://www.urban.org/publications/413183.html.

[5] *See* 26 U.S.C. § 4980H(a)(2) (imposing employer mandate if only at least one of an employer's full-time employees "enroll[s] . . in a qualified health plan with respect to which an applicable premium tax credit . . . is allowed or paid with respect to the employee").

[6] Simply establishing an Exchange may cost a State as much as $60 million. *See* Rita E. Numerof, Galen Inst., *What's Wrong With Health Insurance Exchanges. . .* 7 (May 2012), *available at* http://www.galen.org/assets/WhatsWrongWithExchanges.pdf.

Operating costs are similarly substantial. Colorado projects an operating budget of $66,357,180 for the fiscal year beginning July 1, 2014. *See* Connect for Health Colorado, *2015 Fiscal Year Budget and Health Insurer Assessment* (June 9, 2014), *available at* http://connectforhealthco.com/wp-content/uploads/2013/04/20140609-FY2015-Budget-Market-Assessment-

As matters now stand, States must make choices, or reevaluate the choices they have already made, regarding the establishment of Exchanges blind to the consequences of their decisions. Several States have elected not to establish their own Exchanges, including *amici*, predicating their decisions on the incentives created by the Act as written. In view of the conflict in the courts of appeals, these States must now evaluate whether to take steps to protect employers in their States from the burdens that will be imposed on them should one of their employees enroll in coverage for which a tax credit is allowed or paid. Should the Court reverse the Fourth Circuit's decision, such measures will have been unnecessary.

Other States have chosen not to establish Exchanges, in apparent reliance on the interpretation of the

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Presentation.pdf. Minnesota projects an operating budget of $39,761,416.39 for 2015. *See* MNsure, *Preliminary MNsure Budget for Calendar Year 15 – by Business Area* (Mar. 12, 2014), *available at* https://www.mnsure.org/images/Bd-2014-03-12-Prelim%202015%20Budget.pdf.

Like several other States, Iowa opted to rely on a federally established Exchange "due to the high cost of building and maintaining a state-based exchange – which the state estimated to be $15.9 million annually." U.S. Gov't Accountability Office, *Health Insurance: Seven States Actions to Establish Exchanges under the Patient Protection and Affordable Care Act* 18 (Apr. 2013), *available at* http://www.gao.gov/assets/660/654331.pdf. The Governor of Nebraska explained that "the Department of Insurance and the Department of Health and Human Services calculate the cost of a state insurance exchange for Fiscal Years 2013-2020 at $646 million." News Release, Governor Dave Heineman, *Gov. Heineman on Federal Health Care Law: $646 Million State Exchange Too Costly* (Nov. 15, 2012), *available at* http://www.governor.nebraska.gov/news/2012/11/15_health_care.html.

Act adopted by the IRS and the Fourth Circuit.[7] The conflicting decisions issued by the Fourth and D.C. Circuits mean that these States must now choose whether to undertake the arduous and highly burdensome process of establishing and operating their own Exchanges in order to avoid the risk that their citizens will ultimately not be eligible for tax credits. Should the Court uphold the Fourth Circuit's decision, States may choose not to undertake these efforts and expenditures.

States are even now making important policy choices against this uncertain legal backdrop. At least three States that previously elected to establish their own Exchanges have announced they are reconsidering their decisions, in apparent recognition of the burdens and complications of operating an Exchange.[8] On March 4, 2014, members of the Rhode Island General Assembly introduced an amendment to the Rhode Island Health Benefits Exchange Act that would "transfer all management and operation of the Rhode Island health benefits exchange to the U. S. Department of Health and Human Services

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[7] For example, as the federal government has recognized, Georgia declined to establish its own Exchange in reliance on the IRS's understanding that "Georgians will be eligible for these subsidies whether the [Exchange] is established by the state or federal government." Gov't Br. at 36-37 n.9, *King v. Sebelius*, No. 14-1158 (4th Cir. filed Mar. 18, 2014) (quoting Georgia Health Insurance Exchange Advisory Comm., *Report to the Governor* 13 (Dec. 15, 2011)).

[8] *See* Stephanie Armour, *Five States' Health-Care Exchanges See Costly Fixes*, Wall St. J. (June 3, 2014) (reporting that Oregon will abandon its state-established Exchange and that legislators in Maryland and Rhode Island are considering doing so), *available at* http://online.wsj.com/articles/five-states-health-care-exchanges-see-costly-fixes-1401838017.

and the U. S. Centers for Medicare and Medicaid Services" by December 31, 2014.[9] The legislation's sponsors explained that "the state would spend $40 million annually on exchange operations, money that could be used to fix potholes, roads and bridges."[10] Legislators in Maryland are considering similar measures.[11] On July 1, 2014, Oregon announced that it intends to abandon the Exchange it established to "transition from Cover Oregon [to] the federal system for private health insurance coverage."[12] Whether their citizens will nevertheless be eligible for tax credits through those Exchanges will be critical to these States' decisions whether to decommission their own Exchanges and transition to federally established Exchanges.

The legal uncertainty and confusion resulting from the conflicting lower court opinions is particularly untenable because the conflicting decisions purport to impose diametrically different legal obligations on the same States. The D.C. Circuit "vacate[d] the IRS Rule," *Halbig*, 2014 WL 3579745, at *17, a decision that has national effect. *See National Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) (explaining that hold-

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[9] H. 7817, 2014 Gen. Assemb., Jan. Sess. § 1 (R.I. 2014), *available at* http://webserver.rilin.state.ri.us/BillText/BillText14/HouseText14/H7817.pdf.

[10] Stephanie Armour, *Five States' Health-Care Exchanges See Costly Fixes*, Wall St. J. (June 3, 2014), *available at* http://online.wsj.com/articles/five-states-health-care-exchanges-see-costly-fixes-1401838017.

[11] *Id.*

[12] News Release, Cover Oregon, *Oregon Moves Closer to Federal Website and Easier Enrollment* (July 1, 2014), *available at* https://www.coveroregon.com/discover/news/6.

ings of the D.C. Circuit vacating an agency rule have "nationwide" effect).[13] The Fourth Circuit "uph[e]ld the IRS Rule," Pet. App. 33a, a ruling that certainly applies to the States in the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina, and South Carolina) at the very least and potentially nationally as well.[14] As a result, the States not only face uncertainty about the *eventual* state of the law, but also cannot even be certain of the *current* state of the law *as applied to them*. This confusion cannot be cured without this Court's immediate intervention.

In short, so long as the law remains unsettled, and until the Court provides conclusive guidance, States will be unable to make reasoned and informed decisions regarding these critically important matters. This Court should intervene now to provide States with the clarity that is so urgently needed.

2. States have an overriding interest in the prompt resolution of whether the employer mandate applies to their businesses and to themselves in their capacity as large employers, a question that turns on the availability of tax credits on federally established Exchanges. The employer mandate, which is currently scheduled to take effect on January 1, 2015, requires that certain employers must sponsor coverage for their employees that meets federally

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[13] The uncertainty resulting from the conflicting decisions is exacerbated by the government's insistence, in conflict with the precedent of the D.C. Circuit, that the court's ruling "does not control in other circuits." Pet. for Reh'g En Banc at 15 n.7, *Halbig*, *supra* (D.C. Cir. filed Aug. 1, 2014).

[14] Courts in other jurisdictions will soon issue opinions on the same question of law. *See Pruitt v. Burwell*, No. CIV-11-030-RAW (E.D. Okla.); *Indiana v. IRS*, No. 1:13-cv-1612-WTL-TAB (S.D. Ind.).

specified criteria or pay a penalty. *See* 26 U.S.C. § 4980H.[15] For a State that has not established an Exchange, the employer mandate applies only if the ACA is interpreted to make tax credits available through federally established Exchanges. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014) (explaining that penalties are triggered only if "at least one full-time employee enrolls in a health plan and qualifies for a subsidy"). Currently, hundreds of thousands of businesses in those States do not know whether the employer mandate will apply to them, and consequently whether they are required to provide ACA-compliant health insurance to their full-time employees or pay a substantial fine.

Uncertainty about the employer mandate has substantial deleterious effects for States. In response to the risk of being subject to the employer mandate, many employers are discharging employees or shifting workers from full-time to part-time employment[16]

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[15] The ACA provided that the employer mandate would take effect on January 1, 2014. In 2013, the IRS issued a Notice providing "transition relief" that delayed the effective date of the employer mandate for one year.

[16] The Federal Reserve Board reported that employers "cited the unknown effects of the Affordable Care Act as reasons for planned layoffs and reluctance to hire more staff." Federal Reserve, *Summary of Commentary on Current Economic Conditions by Federal Reserve District* ix (Feb. 2013), *available at* http://www.federalreserve.gov/monetarypolicy/beigebook/files/Beigebook_20130306.pdf. The Urban Institute confirmed that "several large firms recently announced that they would be reducing hours for part-time workers to less than 30" to avoid the "employer mandate" and that due to the employer mandate "there will undoubtedly be some distortions created." Linda J. Blumberg et al., Robert Wood Johnson Found. & Urban Inst., *Why Not Just Eliminate the Employer Mandate?* 2 (May 2014), *available at* http://www.urban.org/publications/413117.html.

in order to avoid the costs they would be forced to incur to provide expensive ACA-compliant health insurance[17] or pay a substantial penalty.[18] A Mercer survey found that 51% of employers plan to "[c]hange workforce strategy so that fewer employees work 30+ hours [per] week."[19] As the CBO recognized, the employer mandate will "reduce employers' demand for labor and thereby tend to lower employment."[20] It further explained that, "[i]n [its] judgment, the costs of the penalty eventually will be borne primarily by workers in the form of reductions in wages or other compensation."[21] This distortion of the labor market damages employment in these States, harms their workers and their economies, and undermines their tax bases. Additionally, because the States

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[17] PricewaterhouseCoopers estimated that "the average [annual] premium for [a] single worker with employer-sponsored coverage" under the ACA was $6,119 in 2014. PriceWaterhouseCoopers, *Health insurance premiums: comparing ACA exchange rates to the employer-based market* 2 (2014), *available at* http://www.pwc.com/us/en/health-industries/health-research-institute/assets/pwc-hri-health-insurance-premium.pdf.

[18] The Congressional Budget Office ("CBO") estimated that businesses would pay $52 billion in penalties between 2014 and 2019. *See* Letter from Douglas W. Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, U.S. House of Representatives, at tbl. 4 (Mar. 20, 2010) ("Elmendorf Letter"), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf.

[19] Mercer, *Health Care Reform After the Decision* 4 (2012), *available at* http://www.ribgh.org/documents/resources/HCR_After_Decision_survey_report.pdf.

[20] CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 124 (Feb. 2014) ("*CBO 2014 Budget*"), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-Outlook2014_Feb.pdf.

[21] *Id.* at 122.

themselves are large employers that are affected by this uncertainty, this Court's prompt intervention is needed so that States – many of which face challenging fiscal constraints as a result of the weak national economy – are able appropriately to plan and budget for employee benefits.

Moreover, the lack of clarity resulting from the conflicting rulings in the courts below hinders States from fashioning appropriate policy responses to the potential application of the employer mandate to their businesses. The employer mandate imposes substantial burdens on businesses, and therefore places at a competitive disadvantage those businesses located in States where it applies. As long as it remains unclear whether the employer mandate applies within their borders, States served by federally established Exchanges, including *amici*, cannot know whether they need to take steps to ameliorate the burdens the mandate imposes on their businesses in order to protect employees from deteriorating employment conditions, to maintain an attractive business environment, and to safeguard their economies.

3. States have a further compelling interest in the prompt resolution of the question whether their citizens are subject to penalties for failing to obtain ACA-compliant health coverage. This "individual mandate" does not apply to those "for whom the annual cost of the cheapest available coverage, *less any tax credits*, would exceed eight percent of their projected household income." *Halbig*, 2014 WL 3579745, at *3. If the Act is incorrectly interpreted to make tax credits available to citizens who live in States with federally established Exchanges, there will be a vast increase in the number of people in

those States subject to the individual mandate. The Kaiser Family Foundation "estimate[s] that 8.1 million (or 83%) of those formerly subsidy-eligible uninsured people would end up being exempt from the individual mandate."[22] Due to the conflicting decisions of the courts of appeals, however, these millions of people do not know whether they are or are not subject to the individual mandate.

Citizens of a State served by a federally established Exchange are therefore compelled to make choices regarding their healthcare coverage against the backdrop of an unresolved legal landscape. They must choose whether to bear the cost of purchasing costly insurance they may not want and may not be legally required to have,[23] or to forgo insurance and risk facing a substantial penalty for violating the individual mandate should it ultimately apply to them.[24] *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (explaining "dilemma" of choice between

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[22] Larry Levitt & Gary Claxton, Kaiser Family Found., *The Potential Side Effects of Halbig* (July 31, 2014), *available at* http://kff.org/health-reform/perspective/the-potential-side-effects-of-halbig/.

[23] The average cost of an ACA-compliant individual health plan is $259 per month for a "Bronze" plan, $328 a month for a "Silver" plan, $353 a month for a "Gold" plan, and $411 a month for a "Platinum" plan. *See* eHealth, *Health Insurance Price Index Report for Open Enrollment and Q1 2014*, at 4, 10 (May 2014), *available at* https://www.ehealthinsurance.com/affordable-care-act/wp-content/themes/ace/price-index/data/quarterly-index.pdf.

[24] The CBO estimated that uninsured individuals would pay $17 billion in penalties between 2015 and 2019. *See* Elmendorf Letter at tbl. 4. Once it is fully phased in by 2016, the penalty "will generally be the greater of $695 annually per adult or 2.5 percent of taxable income (each subject to a cap)." *CBO 2014 Budget* at 122.

"comply[ing] and incur[ring] the costs" of compliance with challenged rule and declining to comply "and risk[ing]" penalties if rule is upheld) (internal quotation marks omitted).

These choices not only profoundly impact a State's citizens, but also affect a State's insurance market specifically and the State's economy more generally. If an individual purchases insurance through a federally established Exchange, he or she may ultimately owe as back taxes to the IRS the subsidies he receives through federally established Exchanges. *See* 26 U.S.C. § 36B(f)(2). The longer the IRS rule stands and the federal government continues to pay out tens of billions of dollars of subsidies, the larger the potential tax debt millions of Americans will incur. A sudden and unpredictable surge in household debt could harm the economies of these States. Moreover, citizens who decide to purchase insurance they neither want nor need out of fear of the penalties imposed by the individual mandate will have less disposable income, and the States' economy could suffer as a result.

Those citizens who instead rely on the D.C. Circuit's decision and decide not to purchase ACA-compliant health insurance risk being subject to fines. Such a result is both unfair to the individuals and economically harmful to the States. States thus have an interest in the immediate resolution of the legal question in order both to protect their citizens from the unfair choices that result from the current lack of certainty as to the applicability of the individual mandate and to avoid the unnecessary economic fallout flowing from legal uncertainty.

II. THE PETITION PRESENTS THE ONLY REALISTIC OPPORTUNITY FOR THE COURT'S RESOLUTION OF THIS IMPORTANT ISSUE THIS TERM

The petition for certiorari should also be granted because it is critical that this issue be resolved on a time frame that permits States to make decisions regarding Exchanges consistent with key deadlines in the implementation of the ACA. Federal regulations require States "electing to establish and operate an Exchange after 2014" to submit to the Department of Health and Human Services an "Exchange Blueprint"[25] no later than "June 1st" of the previous "plan year."[26] The Department must then approve the Exchange Blueprint "6.5 months prior to the Exchange's first effective date of coverage."[27] Accordingly, if it wishes to establish an Exchange to operate in fiscal year 2016, a State must submit to the Department an "Exchange Blueprint" no later than June 1, 2015. Under this regulatory framework, States will be unable to make informed decisions regarding the establishment and operation of Exchanges for fiscal year 2016 unless there is final resolution of the questions presented by the petition

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[25] An "Exchange Blueprint [is] information submitted by a State, an Exchange, or a regional Exchange that sets forth how an Exchange established by a State or a regional Exchange meets the Exchange approval standards established in § 155.105(b) and demonstrates operational readiness of an Exchange as described in § 155.105(c)(2)." 45 C.F.R. § 155.20.

[26] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744, 13,792 (Mar. 11, 2014) (amending 45 C.F.R. pts. 144, 147, 153, 155, 156).

[27] *Id.* at 13,791-92.

sufficiently in advance of that June 1, 2015 deadline. Delaying resolution of this critical issue will simply extend the uncertainty States face into future fiscal years.

This petition from the Fourth Circuit's decision provides the only certain opportunity for the Court to resolve this important issue this Term. The only other court of appeals to decide the question presented thus far is the D.C. Circuit in *Halbig*, where the government's petition for rehearing *en banc* of the panel's decision is now pending. The Court should not delay resolution of the question presented pending the D.C. Circuit's final decision in *Halbig*. Should the D.C. Circuit grant the petition for rehearing *en banc*, a final decision by that court would be issued only after months of briefing and argument. Moreover, even if an *en banc* court were to reverse the panel's decision, that ruling would not relieve the uncertainty States, employers, and consumers face, as two other cases raising this same issue are currently pending in other jurisdictions. *See supra* note 14.

The *amici* States respectfully submit that they need immediate and conclusive clarity regarding their rights and obligations under the ACA, so that they may make appropriate healthcare policy decisions. This petition is the only vehicle that realistically provides this Court with the opportunity to address this issue this Term. The *amici* States therefore urge this Court to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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